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NO. 87 - 1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

HANSEN BROTHERS ENTERPRISES,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 21 of the Supreme Court Rules, the Petitioner, HANSEN BROTHERS ENTERPRISES (hereinafter referred to as HANSEN BROS.) petitions this Court for a Writ of Certiorari.

Questions Presented For Review

1. Whether this Court should review a Court of Appeals' decision enforcing a Board order which conflicts with this Court's decision in *Belknap v. Hale*, 463

U.S. 491 (1983) by ignoring this Court's definition of a "permanent" replacement for an economic striker and rendering meaningless the protection this Court afforded employers from misrepresentation and breach of contract lawsuits when they make offers of permanent employment to replacements.

2. Whether this Court should review a Court of Appeals' decision enforcing a Board order which demonstrated (1) an arbitrary and capricious application of its own rules and regulations, (2) a total disregard of its statutory mandate to adopt a finding of the administrative law judge in the absence of an exception thereto and (3) an implicit rejection of well established precedent regarding the allocation of burdens of proof in determining whether economic strikers are entitled to reinstatement, so as to constitute a decision so far departed from the accepted and usual course of judicial

proceedings to warrant an exercise of this Court's power of supervision.

List of Parties To The Proceeding

Pursuant to Rule 28.1 of the Supreme Court Rules, HANSEN BROTHERS ENTERPRISES represents that it has no parent companies, subsidiaries and affiliates it is required to list.

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Opinions Below

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Jurisdiction

The Judgment of the Court of Appeals For The District Of Columbia Circuit was entered on March 12, 1987 (Appendix at A and B). A timely petition for rehearing was filed by HANSEN BROS. and was denied by the Court of Appeals For The District Of Columbia Circuit on April 28, 1987 (Appendix at D). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1254 and Rule 20(4) of the Supreme Court Rules.

Statutes Involved

Section 10(c), National Labor Relations Act, as amended, 29 U.S.C. Section 160(c). (Appendix F).

Section 102.46(b), National Labor Relations Board Rules and Regulations, Series 8, as amended. (Appendix G).

Section 102.46(c), National Labor Relations Board Rules and Regulations, Series 8, as amended. (Appendix H).

Section 102.48(a), National Labor

Relations Board Rules and Regulations, Series 8, as amended. (Appendix I).

Statement of the Case

HANSEN BROS. is a California engineering contractor which employed truck drivers represented by the TEAMSTERS LOCAL 150 (J.A. at 17-18).[1/] The last Collective Bargaining Agreement to which HANSEN BROS. and the TEAMSTERS LOCAL 150 were signatory expired by its terms on July 1, 1983 (J.A. at 7-8).

On August 18, 1983, while the parties were engaged in collective bargaining negotiations, all of HANSEN BROS.' eighteen employees who were represented by the TEAMSTERS LOCAL 150 commenced an economic strike against HANSEN BROS. (J.A. at 18, 51, 61, 104, 122). As a consequence of the TEAMSTERS' strike, other employees of HANSEN BROS. who were represented by the

1/ "J.A. at ___" refers to pages of the "Joint Appendix" which was filed in the Court Of Appeals For The District Of Columbia Circuit in Case No. 86-1277.

OPERATING ENGINEERS UNION and by the LABORERS UNION, respected the TEAMSTERS' picket line and refused to work at HANSEN BROS. (J.A. at 51-52, 162). As of August 18, 1983, seventy-five of HANSEN BROS.' employees were either striking or refusing to cross the TEAMSTERS LOCAL 150's picket line (J.A. at 162-63).

On August 29, 1983, HANSEN BROS. sent each of its striking employees a certified letter which provided in relevant part:

> You should be aware that we are going to continue to operate our business to the best of our ability for whatever length of time the strike may last. As you know, we are running ads and receiving lots of applications for the jobs that we have available. We would prefer, of course, to have our experienced Teamster employees doing this work, but if they refuse to do so, we have no choice but to replace them by other employees who are willing to work under the conditions that you have apparently found unacceptable. You should further be aware that if a replacement is hired for your position, you may lose your right to reemployment if you later change your mind and wish to come back to work.

> Accordingly, we would suggest that you give this matter your serious consideration and come back to your job before we have completed our hiring procedures and there are no jobs available. There is no reason why we can't continue to negotiate and attempt to settle our differences on the contract while you are working and receiving a paycheck.

(J.A. at 219-220.)

Despite HANSEN BROS.' admonition that "if a replacement is hired for your position, you may lose your right to re-employment" and that the strikers should "come back to your job before we have completed our hiring procedures and there are no jobs available," the TEAMSTER strikers refused to return to their jobs (J.A. at 164-65). HANSEN BROS. then began hiring replacement workers for its striking employees and by September 7, 1983, had hired seven replacements (J.A. at 164).

When hiring the replacements for its striking employees, MR. ARLIE HANSEN, President of HANSEN BROS., (J.A. at 182) informed them that he hoped they would

remain with the company "forever" (J.A. at 146-147, 148). He further informed the replacements that they were "permanent," but that he could not make a promise of permanent employment only because "the government could force the Employer to discharge the replacements" (J.A. at 141-148, 149, 151-152, 152, 153). The single qualification placed by MR. ARLIE HANSEN on his offers of "permanent" employment to the replacements was the direct result of counseling from HANSEN BROS.' attorney, MR. E. A. HUBBERT, JR. (J.A. at 141, 153). Not only had MR. HUBBERT informed his client of a recent court decision decided "back east" where an employer had incurred liability by discharging its permanent replacements to bring back its striking employees, but also he had informed the TEAMSTERS LOCAL 150 Negotiating Committee of the same court decision (J.A. at 29, 119-20, 126, 135, 195).

At approximately 8:15 P.M. on

September 7, 1983, MR. FRANK LOMASCOLA, Business Agent for TEAMSTERS LOCAL 150, telephoned MR. HUBBERT and informed him that the strikers were ready to return to work at HANSEN BROS. (J.A. at 24-25). After relaying MR. LOMASCOLA's message to MR. HANSEN, MR. HUBBERT was informed by MR. HANSEN that Union Steward Tom Browning and Tom Osborne should report for work the following day because they could do the most jobs and were among those strikers with the most seniority with HANSEN BROS. (J.A. at 122, 170-172, 188). MR. HANSEN further informed MR. HUBBERT that the remaining strikers would be brought back to work in accordance with the expired Collective Bargaining Agreement as jobs became available (J.A. at 173, 189).

In a later telephone conversation on September 7, 1983, MR. LOMASCOLA was informed by MR. HUBBERT that two strikers, Tom Osborne and Tom Browning, were needed by HANSEN BROS. the following day (J.A. at

25, 69, 188) and that HANSEN BROS. would not displace the replacements to make room for the strikers (J.A. at 83). MR. HUBBERT did mention, however, that as work picked up, additional strikers would be taken back as well (J.A. at 189, 205). MR. LOMASCOLA responded that "the employees and the Union could not accept just taking back two people (and) that (the Union's) position was that the Employer had to let go the replacements that had been hired and take back all the people that had gone out on strike" (J.A. at 25, 189, 204). MR. LOMASCOLA further objected to the fact that the two people named by HANSEN BROS. to start work the following day were, according to him, "out of seniority" and informed MR. HUBBERT that the strikers "would never accept those two people back out of seniority" (J.A. at 70). MR. HUBBERT responded that the two named strikers were the most qualified and were two of the top three people in terms of

length of sevice with HANSEN BROS. (J.A. at 189) and reiterated to MR. LOMASCOLA that the remaining strikers would be picked up in fairly short order (J.A. at 189, 204-05). MR. LOMASCOLA then ended their telephone conversation by informing MR. HUBBERT that neither the Union nor the striking employees would accept the HANSEN BROS.' offer to bring back the two specifically named strikers the following morning and the other strikers as work picked up (J.A. at 70, 72-73, 74, 77-78, 80, 190, 190-191).

At a negotiating session held on September 13, 1983, MR. LOMASCOLA stated to the Management Committee that the striking employees were ready to go back to work, but that the strike replacements ("scabs" as he referred to them) had to be gotten rid of and all of the strikers put back to work (J.A. at 89-90, 174, 209, 211). In addition, MR. LOMASCOLA stressed the length of a striker's service with HANSEN BROS. as the determining factor for bringing the

strikers back to work (J.A. at 175).

MR. HUBBERT responded to MR. LOMASCOLA's offer to return to work by informing everyone present of a recent court decision "back east" where permanent strike replacements who were discharged by their employer to make room for the strikers were permitted to sue their employer (J.A. at 29, 87, 119-20, 126, 176, 195, 201). It was reiterated, however, that HANSEN BROS. would take back the strikers from a preferential hiring list as work allowed (J.A. at 86, 89, 180-181, 211), but that HANSEN BROS. was not willing to return the strikers to their former positions under the terms of their offer and was not willing to displace the replacements who had been hired to perform the strikers' work (J.A. at 86, 108, 133, 135, 155, 175, 180-181, 211). MR. LOMASCOLA responded that "(he) really didn't care whether they were permanent employees or not" since he regarded the

replacements to be "the Employer's problem" (J.A. at 29-30, 87, 89, 108-09, 116, 126, 195, 210-12, 217).

At the September 13th negotiating meeting, HANSEN BROS. modified its union security proposal (J.A. at 88, 192, 210) to a form of "maintenance of membership" clause which required continued union membership for all members of the TEAMSTERS LOCAL 150, but "carved out an exception" for the strike replacements by affording them the option of joining or not joining the TEAMSTERS UNION (J.A. at 175-176, 192-193). By the end of the September 13th negotiating meeting, the TEAMSTERS LOCAL 150's position remained that as part of any negotiation settlement agreement, the strike replacements ("scabs") had to be discharged and all the strikers brought back to work (J.A. 91-92, 193, 195, 207, 211).

On September 30, 1983, another meeting was held at the request of a

federal mediator to explore the possibility of resolving the strike (J.A. at 196-97). MR. HUBBERT reiterated that HANSEN BROS. would take back the strikers in accordance with the seniority section of the parties' expired Collective Bargaining Agreement and by placing them on a preferential hiring list, but that it was not willing to discharge the strike replacements (J.A. at 198-199). The Union's position remained that they would not settle the dispute on that basis (J.A. at 198, 200).

Pursuant to Rule 21(i) of the Supreme Court Rules, the basis for federal jurisdiction in the Court of Appeals For The District Of Columbia Circuit is 29 USC Section 160(f).

Argument

POINT I

THE SUPREME COURT SHOULD GRANT CERTIORARI SINCE THE COURT OF APPEALS PERMITTED THE BOARD TO ADOPT A DEFINITION OF A "PERMANENT" STRIKE REPLACEMENT WHICH CONFLICTS WITH THE DEFINITION PRONOUNCED BY THIS COURT IN *BELKNAP v HALE*

In *Belknap v. Hale*, 363 U.S. 491 (1983), this Court adopted a definition for a "permanent" strike replacement which conflicts with the definition adopted by the Board and was sanctioned by the Court of Appeals in the present case. The issue addressed by this Court in *Belknap* was "whether the National Labor Relations Act preempted a misrepresentation and breach-of-contract action against an employer brought in state court by strike replacements who were displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and assured they would not be fired to accommodate returning strikers." Id. at 493. This Court held that the state suits

brought by the replacements were not preempted since Congress did not intend to leave such individuals without a remedy where their employer deceived them "by promising permanent employment knowing that it may choose to reinstate strikers or may be forced to do so by the Board." Id. at 503.

Most noteworthy for present purposes is that the *Belknap* Court expressly rejected the employer's and the Board's position that "conditioning" offers of employment to replacements by subjecting them to discharge "if the employer is forced by Board order to reinstate strikers or if the employer settles on terms requiring such reinstatement," would render the replacements "nonpermanent." Id. at 502-03. In rejecting the employer's and the Board's position, the *Belknap* Court stated:

> [A]n employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union

> and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike.

Id. at 503.

Finally, this Court indicated in *Belknap* that the possibility of settling economic and unfair labor practice strikes would not be hindered "if the employer is careful to protect itself against (misrepresentation and breach of contract) suits in the course of contracting with strike replacements." Id. at 503. Indeed, in *Belknap*, this Court indicated that "an employer may condition his offer to replacements and hence avoid conflicting obligations to strikers and replacements" and "will very likely do so." Id. at 505-06, fn. 9. Accordingly, this Court expressed a lack of sympathy toward the employer who makes unconditional conflicting commitments to its employees since such was "of the employer's own making," citing

W. R. Grace and Co. v. Local 759, 461 U.S. 757 (1983). Id.

In the present case, the credited and uncontradicted testimony taken at the hearing before the administrative law judge[2/] demonstrated that the replacements hired by HANSEN BROS. were permanent within the meaning of *Belknap*.

> BY THE GENERAL COUNSEL:
>
> "As of September 7th, the employees that were replacing the striking employees, those you hired, isn't it true that those were temporary employees?"
>
> BY ARLIE HANSEN
>
> "They are only temporary to the extent that the government could, under some kind of an order, force me -- us -- the [sic] (to) discharge

---

2/ In resolving credibility, JUDGE HEILBRUN credited the witnesses called by HANSEN BROS. and discredited the witnesses called by the GENERAL COUNSEL (Appendix E at E-17). *Id.*

them. When we hired those people, we told them that we wanted them to be permanent. We wanted them to feel like they would want to be permanent, and that we wanted them to be permanent." (J.A. at 140-41). Indeed, as Chairman Dotson points out in his dissent, when taken together, all of the evidence demonstrates that HANSEN BROS. hired "permanent" replacements within the meaning of *Belknap.* (Appendix E at pp. E-8 through E-12.)

A review of the credited and uncontradicted evidence demonstrates clearly that the Board has ignored this Court's recognized haven for "the employer (who) is careful to protect itself against (misrepresentation and breach of contract) suits in the course of contracting with strike replacements." Id. at 505. Indeed, the Board has penalized HANSEN BROS. for being an "honest employer," id. at 502, because HANSEN BROS. informed its

replacements at the outset of their employment that they could lose their jobs "if the government forced us to fire them."

The Board has misapplied the law as established by this Court in *Belknap v. Hale* to the facts of the present case. Rather than concede that an employer who promises a strike replacement "permanent" employment, subject to discharge through a Board order or a settlement in union negotiations, will not be deemed to have violated the Act, the Board has interpreted *Belknap* to enable such employer only "to avoid civil liability." *Hansen Brothers Enteprises*, 279 NLRB No. 98, fn. 6 (1986) (Appendix E at E-3, fn. 6).

Should the Board be permitted to find an employer who has sought to protect itself from *Belknap* liability in violation of the Act, such would render the protection afforded "careful" and "honest" employers by this Court meaningless. Indeed, "(the Board's) view of the law

would inevitably become widely known and would deter honest employers from making promises that they know they are not legally obligated to keep." *Belknap v. Hale*, 463 U.S. at 502.

Based on the foregoing, HANSEN BROS.' petition for writ of certiorari should be granted.

POINT II

THE COURT OF APPEALS HAS SANCTIONED THE BOARD'S DECISION AND ORDER WHICH HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO WARRANT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

A. The Court Of Appeals Has Sanctioned The Board's Arbitrary And Capricious Application Of Its Own Rules And Regulations.

The recommended Decision and Order of Administrative Law Judge HEILBRUN was served upon HANSEN BROS., TEAMSTERS LOCAL 150 and the Board's GENERAL COUNSEL by Order Transferring Proceedings To The National Labor Relations Board dated August 2, 1984 (J.A. at 221-17). Accompanying said Order and recommended Decision were

excerpts from the Board's current rules and regulations which inform the parties, inter alia, of what "shall" constitute "exceptions" to the recommended Decision and a "brief" in support thereof. See Section 102.46(b) and (c) of the Board's Rules and Regulations. (Appendix G and H hereto and J.A. at 228-30.)

Although the GENERAL COUNSEL chose not to file "exceptions" to the recommended Decision and Order, the TEAMSTERS LOCAL 150 filed a twenty page "brief" with the Board which it termed its "exceptions." (J.A. at 231-50). HANSEN BROS. timely filed a Motion To Strike Exceptions along with supporting papers (J.A. at 251-62) which the Board denied (Appendix E at E-1, fn. 1). The Court of Appeals failed to address HANSEN BROS.' contention that the Board acted arbitrarily and capriciously in its application of Sections 102.46(b) and 102.48(a) of its own rules and regulations in the present case (Appendix A, B, C and

D).

In essence, by denying HANSEN BROS.' Motion To Strike Exceptions, the Board permitted the TEAMSTERS LOCAL 150 to "except" to virtually the entire decision of Judge HEILBRUN and to ignore its rule regarding what an exception "shall" contain. See Section 102.46(b) of the Board's Rules and Regulations, Series 8, as amended (Appendix G). By permitting the Board to apply its rules and regulations in an "arbitrary and capricious" manner, the Court of Appeals has sanctioned a Board Order which has so far departed from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's power of supervision. See *NLRB v. Southwest Security Equipment Co.*, 736 F.2d 1332, 1335 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (reviewing court may overturn agency's application of properly-adopted regulation only if application is arbitrary or capricious, but in doubtful

situations should merely give "weight" to the Board's application of the Act).

B. The Court of Appeals Has Sanctioned The Board's Disregard Of Its Mandate To Adopt A Finding Of An Administrative Law Judge In The Absence Of An "Exception" Thereto.

In his recommended Decision and Order, JUDGE HEILBRUN found that "(HANSEN BROS.) has advanced five separate grounds upon which to contend that conditions have always attached to the offers (to return to work), and the composite of credible testimony is sufficient to support each defense." (Appendix E at E-18, lines 5-8). Even under the most liberal reading of the so-called "exceptions" filed by the TEAMSTERS LOCAL 150 (J.A. at 231-50), it seems clear that no exception was made to this specific finding of the administrative law judge. Indeed, even in its wholesale exceptions where the TEAMSTERS LOCAL 150 indicated that it "specifically objected to paragraphs 2, 3 and 4 of page 4, and paragraph 2 of page 5 of the Administrative

Law Judge's Decision" (J.A. at 240), it failed to object to the specific finding of JUDGE HEILBRUN that the TEAMSTERS LOCAL 150 had always attached five conditions to its offer to return the strikers to work which finding is contained in paragraph 1 of page 5 of his Decision (Appendix E at E-18, lines 5-8).

In the absence of an objection to JUDGE HEILBRUN's finding that the credible testimony demonstrated that the TEAMSTERS LOCAL 150 had always conditioned its offers made on behalf of the strikers to return to their jobs at HANSEN BROS., the Board was required to adopt pro forma said finding of JUDGE HEILBRUN. Section 10(c) of the NLRA, as amended, 29 U.S.C. Section 160(c) and Section 102.48(a) of the Board's Rules and Regulations, Series 8, as amended. (Appendix F and I).

By sanctioning the Board's disregard of its statutory mandate and own rules and regulations requiring it to adopt a finding

of an administrative law judge in the absence of a specific exception thereto, the Court of Appeals has sanctioned a Board Order which has so far departed from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's power of supervision. *See NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350 (1953) (an exception to the judge's decision that his recommendations as to the remedy were ccontrary to the law and unsupported by the evidence is not adequate notice that the employer intended to press the specific issue of the fairness of the remedy imposed by the Board); *NLRB v. Iron Workers Union Local 378*, 473 F.2d 816, 817 (9th Cir. 1973), (Court will enforce the Board's adoption of the judge's findings and recommendations where a party did not, with adequate specificity, object to the judge's failure to find that a grievance procedure was applicable to the controversy); *Southwest Security Equipment*

Corp., 262 NLRB 665, fn. 1, *enforced in part*, 736 F.2d 1332 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (excepting to finding that the party's agreement expired does not encompass finding that hiring hall referral provision of that agreement survived expiration. Since the latter amounts to an additional exception not made, the Board adopted pro forma the judge's finding with respect to the hiring hall provision).

C. The Court Of Appeal Has Sanctioned The Board's Implicit Rejection Of Well Established Precedent Regarding The Allocation Of Burdens Of Proof In Determining Whether Economic Strikers Are Entitled To Reinstatement

The prevailing law as pronounced by this Court and accepted by the Board is that economic strikers are entitled to reinstatement to their former positions upon making an unconditional offer to return to work, provided an employer cannot show a legitimate and substantial business justification for failing to reinstate them. *NLRB v. Fleetwood Trailer Co.*, 389

U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). In the present case, the Board with the approval of the Court of Appeals, ignored the finding of JUDGE HEILBRUN that the TEAMSTERS LOCAL 150 had attached five separate conditions to its offers made on behalf of the strikers to return to work and unpermissibly shifted the burden of proof to HANSEN BROS. to prove a business justification for not reinstating the strikers before finding that an unconditional offer of reinstatement was made on their behalf.

First, JUDGE HEILBRUN found that the credited and uncontradicted evidence showed that the TEAMSTERS LOCAL 150 conditioned each of its offers to return to work by (1) demanding "immediate" reinstatement, (2) for "all" strikers, (3) "in accordance with strict seniority," (4) "as part of any bargaining settlement that might be

reached," and (5) provided that the "scabs be discharged." Under established precedent, the presence of even one of the foregoing "conditions," permits an employer to refuse reinstatement to an economic striker. *See Coastside Scavenger Co.*, 273 NLRB No. 198 (1985) (employer lawfully refused to reinstate strikers where union conditioned their offer on their being hired "immediately"); *Times Herald Printing Co.*, 221 NLRB 225, 229 (1975) (no unconditional offer to return to work where the union requested reinstatement of "all" strikers where jobs were available for only a few strikers); *Lone Star Industries*, 279 NLRB No. 78 (1986) (economic strikers do not have the right to demand reinstatement in order of their "seniority"); *Mid Country Mix, Inc.*, 264 NLRB 782, 790, fn. 62 (1982) (conditioning an offer to return to work to "facilitate negotiations" is not an unconditional offer); and *Roberts Oldsmobile, Inc.*, 252 NLRB 192, fn. 1,

198-199 (1980) (union offer to return to work was not unconditional since it was conditioned on the "discharge" of strike replacements and on the reinstatement of a discharged employee).

Second, it is the General Counsel's burden to establish that an unconditional offer to return to work was made on behalf of an economic striker before the Board seeks to determine whether an employer has established as an affirmative defense that the existence of a "legitimate and substantial business justification" privileged its refusal to reinstate the strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), *citing, NLRB v. Grate Dane Trailers*, 388 U.S. 26, 34 (1967). In the present case, the Board ignored JUDGE HEILBRUN's finding that "five conditions" were "always attached" to the TEAMSTER LOCAL 150's offers to return to work and first scrutinized HANSEN BROS.' affirmative defense that its replacements

were "permanent." Once finding that the replacements were "temporary," the Board reasoned backwards to conclude that "where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate" (Appendix E at E-2).

Finally, the Board and the Court of Appeals ignored entirely the additional uncontradicted evidence demonstrating that HANSEN BROS. had established a second legitimate and substantial business justification for refusing to reinstate the strikers. Once again, the record evidence showed that HANSEN BROS.' business had declined and specifically that it was entering the "slow part" of the year, that some of its employees represented by the OPERATING ENGINEERS and LABORERS UNIONS had quit, and that some of HANSEN BROS.' non-ready mix operations had been shut down totally (J.A. at 84, 164, 165, 172 and

204). *See generally NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) (a ready mix employer's need for employees was marginal due to the seasonal nature of its business).

By sanctioning the Board's implicit rejection of well established precedent regarding the allocation of burdens of proof in determining whether economic strikers are entitled to reinstatement, the Court of Appeals has sanctioned a Board Order which has so far departed from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's power of supervision.

Conclusion

This Court should grant certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit which enforced an Order of the Board which conflicts with this Court's decision in *Belknap v. Hale*, 363 U.S. 491

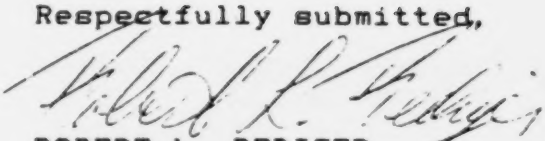
(1983). The Board's Order at issue ignores this Court's definition of a "permanent" strike replacement for an economic striker and renders meaningless the protection this Court made available to prudent employers when they make offers of "permanent" employment to replacement workers.

This Court should also grant certiorari to review the Court of Appeals' decision enforcing a Board order which (1) applied its own rules and regulations in an arbitrary and capricious manner, (2) disregarded its mandate to adopt findings of an administrative law judge to which no "exception" has been taken, and (3) implicitly rejected well established precedent regarding the allocation of burdens of proof in determining whether economic strikers are entitled to reinstatement, so as to constitute a decision so far departed from the accepted and usual course of judicial proceedings to warrant an exercise of this Court's power

of supervision.

Dated: June 22, 1987.

Respectfully submitted,



ROBERT L. REDIGER
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1277 **September Term, 19**86

Hansen Brothers Enterprises,
Petitioner

v.

National Labor Relations Board,
Respondent

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: RUTH B. GINSBURG and BUCKLEY, Circuit Judges, and FAIRCHILD, *Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

O R D E R

This petition for review was considered on the record from the National Labor Relations Board and was briefed and argued by counsel. The court has determined from the record and the issues and arguments presented that the review petition occasions no need for a published appellate opinion. See D.C. Cir. R. 13(c). For the reasons indicated in the attached memorandum, it is

ORDERED and ADJUDGED, by the Court, that the petition for review be denied. The Board's order, on submission of an appropriate judgment, shall be enforced in full. It is

FURTHER ORDERED, by the Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
For The Court
George C. Fisher
George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX A

APPENDIX A

No. 86-1277, Hansen Brothers Enterprises v. NLRB

MEMORANDUM

The administrative law judge determined that the record "utterly failed" to support the company's assertion that replacement drivers held positions with "permanent characteristics." Joint Appendix (J.A.) 226. Accepting this finding, which a rational mind could reach from the evidence, the Board arrived at a legal conclusion consistent with established Board precedent: "[W]here striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is [appropriately unconditional]." J.A. 287. Because the Board thus made fact and law determinations that fall within its authority, and did not act unreasonably, the petition for review must be denied, and the Board's order shall be enforced.

APPENDIX B

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1277 **September Term, 19** 86

Hansen Brothers Enterprises

v.

National Labor Relations Board

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 2 8 1987

GEORGE A. FISHER
CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; Fairchild*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit

ORDER

Petitioner's suggestion for rehearing en banc has been transmitted to the court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that petitioner's suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. 294(d).

APPENDIX C

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1277 **September Term, 19** 86

Hansen Brothers Enterprises

v.

National Labor Relations Board

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 28 1987

GEORGE A. FISHER
CLERK

BEFORE: RUTH B. GINSBURG and BUCKLEY, Circuit Judges; FAIRCHILD*,
Senior Circuit Judge, U.S. Court of Appeals
for the Seventh Circuit

ORDER

Upon consideration of petitioner's petition for rehearing, filed April 13, 1987, it is

ORDERED, by the court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. 294(d).

APPENDIX D

APPENDIX D

DOeJ

279 NLRB No. 98

D--3676
Grass Valley, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANSEN BROTHERS ENTERPRISES

and

Case 20--CA--18393

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On 2 August 1984 Administrative Law Judge David G. Heilbrun issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

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1 The Respondent also filed a motion to strike the Charging Party's exceptions under Sec. 102.46 of the Board's Rules and Regulations. The motion is hereby denied. Although the Charging Party's exceptions are in the nature of a brief and do not contain an alphabetical listing of authorities relied on, they do set forth the questions of fact and law to which exceptions are taken, identify that part of the judge's decision to which objection is made, designate by precise citation of page the portions of the record relied on, and state the grounds for the exceptions. See Teamsters Local 851 (Purolator Courier), 268 NLRB 452 fn. 1 (1983).

2 The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an

(Footnote continued)

APPENDIX E-1

The judge found that the Union's offer on behalf of the striking employees to return to work was at all times coupled with a demand that all strikers be immediately reinstated to their former positions, and that any striker replacements in those positions be discharged.[3] We affirm the judge's finding for the reasons stated in his decision.

We disagree, however, with the judge's conclusion that this offer was not unconditional. It is well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided their positions have not been filled by permanent replacements.[4] Thus, where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate.

Here, the judge found that the Respondent failed to establish that any of the striker replacements were hired as permanent employees. Excepting to this finding, the Respondent contends that the replacements' status as permanent employees is clearly established by (1) a 29 August 1983 letter is sent to the strikers; (2) statements the Respondent's president Arlie Hansen made to the replacements; and (3) the Respondent's repeated refusals during ongoing negotiations to displace the replacements.

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administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

3 The judge found that the Union first communicated its offer to the Respondent on 7 September 1983.

4 NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). Of course, even where permanent replacements have not been hired, an employer may refuse to reinstate economic strikers who unconditionally offer to return to work upon proof of a ''legitimate and substantial business justification.'' NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

We disagree. The Respondent's letter to the strikers stated only that the strikers ''may'' lose their right to reemployment if a replacement was hired for their position.[5] Hansen's statements to the replacements are similarly noncommital. Hansen admitted on cross-examination that while he told the replacements that he ''wanted'' to consider them as permanent employees and ''wanted'' them to consider themselves as permanent employees, he did not actually tell them they were permanent.[6] As for the Respondent's statements during negotiations, at most they show its own intent to permanently employ the replacements. Such a showing fails to satisfy the employer's burden; rather, the employer must show a mutual understanding between itself and the replacements that they are permanent.[7] Here, the Respondent failed to present

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[5] The full text of the letter, in relevant part, reads as follows:

> You should be aware that we are going to continue to operate our business to the best of our ability for whatever length of time the strike may last. As you know, we are running ads and receiving lots of applications for the jobs that we have available. We would prefer, of course, to have our experienced Teamster employees doing this work, but if they refuse to do so, we have no choice but to replace them by other employees who are willing to work under the conditions that you have apparently found unacceptable. You should further be aware that if a replacement is hired for your position, you may lose your right to reemployment if you later change your mind and wish to come back to work.
>
> Accordingly, we would suggest that you give this matter your serious consideration and come back to your job before we have completed our hiring procedures and there are no jobs available. There is no reason why we can't continue to negotiate and attempt to settle our differences on the contract while you are working and receiving a paycheck.

[6] Contrary to our dissenting colleague, we do not read the Supreme Court's decision in Belknap, Inc. v. Hale, 463 U.S. 491 (1983), as converting such vague statements as Hansen's into an offer of permanent employment for the purposes of determining strikers' reinstatement rights. Belknap does not hold that an employer need no longer promise replacements permanent employment to render them permanent; it holds that to avoid civil liability to the replacements should they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer may promise the replacements permanent employment subject to such conditions subsequent.

[7] Associated Grocers, 253 NLRB 31 (1980).

any evidence whatsoever that the replacements understood that they were hired as permanent employees.

Accordingly, we find that the replacements were temporary, that the Union's offer to return was therefore appropriate, and that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing thereafter to reinstate the strikers.

Conclusions of Law

1. Hansen Brothers Enterprises is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(6) and (7) of the Act.

3. By failing and refusing to reinstate the economic strikers immediately upon the Union's 7 September 1983 offer on their behalf to return to work, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully failed and refused to immediately reinstate the economic strikers upon the Union's unconditional offer on their behalf to return to work, we shall order that they be reinstated to their former jobs or, if those job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make

them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as set forth in Florida Steel Corp., 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Hansen Brothers Enterprises, Grass Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate economic strikers who have unconditionally offered to return to work to their former or substantially equivalent positions, where those positions have not been filled with permanent replacements and absent any other legitimate and substantial business justification for failing and refusing to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer the economic strikers on whose behalf the Union offered to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision and Order.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Grass Valley, California facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 30 April 1986

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting.

My colleagues' handling of the evidence in this case gives rise to a disquieting concern. Briefly stated, the majority's analytic approach to the evidence reflects an undue taste for verbal analysis rather than a recognition of the real world facts.

It is undisputed that the Respondent notified all the strikers by letter shortly after the strike began that replacements were to be hired and that ''you may lose your right to reemployment'' as a result. My colleagues reject this letter as evidence of permanency because it used the word ''may'' rather than ''shall.'' The Respondent, however, used the equivocal term not because it was undecided, but out of its obviously prudent concern that it might otherwise subject itself to an unfair labor practice charge should the strike be found an unfair labor practice strike, rather than an economic strike.[1] In any event, at the very least the letter indicates that the Respondent was then contemplating hiring permanent replacements.

The majority's analysis of Arlie Hansen's statements to the replacements is equally flawed. The majority finds cause for rejection of this evidence because Hansen only said he ''wanted'' to consider them permanent and ''wanted'' them to consider themselves permanent.[2] As with the letter, however, my colleagues ignore the basis for this phraseology. In Belknap, Inc. v. Hale,[3] the Supreme Court held that an employer my be sued for breach of

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1 Unlike economic strikers, of course, unfair labor practice strikers are entitled to immediate reinstatement upon unconditionally offering to return to work, even if it is thereby necessary for the employer to discharge its replacements. E.g., Collins & Aikman Corp., 165 NLRB 678 (1967).

2 According to Hansen, he told the replacements that he ''wanted'' to consider them as permanent employees and ''wanted'' them to consider themselves as permanent employees, but he ''could not guarantee that because of the labor problems and negotiations going on.''

3 463 U.S. 491 (1983).

contract in state court by striker replacements if, having offered them permanent employment, they are later displaced by reinstated strikers pursuant to a settlement with the union or a Board unfair labor practice order. The Court held that an employer could protect itself from such suits by promising permanent employment subject to these contingencies---and in so holding specifically rejected the argument that such a qualified promise would make the replacements temporary rather than permanent. Here Hansen testified that, to the extent his promise was qualified, it was only to satisfy the requirements of Belknap; that in no circumstances other than those cited in that case would he have discharged the replacements. As there is no evidence suggesting the replacements understood otherwise, I find no reason to disregard Hansen's testimony. Certainly his failure, relied on by the majority, to draw a proper verbal distinction regarding ''conditions subsequent'' does not supply such a reason.

Early in the strike, the Respondent demonstrated its contemporaneous belief that it had permanently replaced the strikers. Record evidence, credited by the Board's administrative law judge, shows that at a 13 September 1983 meeting attended by the Union's business representatives, the Respondent's attorney Hubbert brought up a case decided ''back East'' dealing with employer liability to permanent replacements. Hubbert mentioned Belknap only because the Union was pressing for a settlement that provided immediate reinstatement for the strikers. Hubbert would have raised the Belknap problem only in a context where he believed the Respondent had employed permanent replacements and might be subject to Belknap-type liability in the event those permanent replacements were let go to accommodate strikers.

Thus, all the evidence available on this question---the Respondent's 29 August letter to the strikers, Arlie Hansen's statements made to the replacement employees, and Respondent's 13 September statements to the Union---is consistent with only one finding, viz, the Respondent had hired on a permanent basis and sought only to protect itself from Belknap liability to the replacements.[4] There is nothing in the record to suggest that the replacements would not have continued their employment indefinitely in the absence of an economic catastrophe putting the Employer out of business or this Board making an unfair labor practice finding that required immediate reinstatement of the strikers. There is a great deal in this record to ''show that the men [and women] who replaced the strikers were regarded by themselves and the [Employer] as having received their jobs on a permanent basis.'' Georgia Highway Express, 165 NLRB 514, 516 (1967), affd. sub nom. Teamsters Local 728 v. NLRB, 403 F.2d 921 (D.C. Cir. 1968), cert. denied 393 U.S. 935 (1968).

The majority's separate verbal analysis of each of two pieces of evidence treated by it in this case surely proves too much. It places all its emphasis

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[4] The majority's citation of Associated Grocers, 253 NLRB 31 (1980), is factually inapposite to this case. In Associated Grocers, the respondent failed after 10 May 1978 to present replacement hires with a letter stating that their employment was permanent although it had done so for hires prior to that date. The failure to do so was described by the Board as a ''communication failure'' between the respondent's managers. Those not receiving the 10 May letter had signed a document when hired stating that they understood there to be no guarantee of consideration for full-time employment. In the absence of any explanation for the respondent's action, the Board commented that ''[t]he permanency of the . . . replacements was established only in the mind of Respondent's president.'' (Emphasis added.) That may have been so under the very different facts in Associated Grocers, but it is not the case here. This Respondent's hiring of permanent replacements is to be inferred from the extrinsic evidence of what it said and did in its dealings with the Union, the strikers, and the new hires. One need not guess at the Respondent's intent as was required in Associated Grocers.

on the use of ''may'' rather than ''shall'' in the 29 August letter and the alleged ''vagueness''[5] of Hansen's statement to the replacements and ignores Hubbert's 13 September statements to the Union. It thus implies that the Respondent sought in 1983 to hire only temporary replacements. That implication is surely unrealistic in light of the Respondent's having litigated this very question before the administrative law judge and this Board.

The preponderance of the evidence in this case demonstrates that the Respondent sought to hire permanent replacements while protecting itself against the adverse possibilities posed by the Belknap case, which had issued only a few weeks prior to the strike. Two-and-a-half years later, this Board sits in judgment on the verbal constructs employed to that end and finds them inadequate. Looking only to those verbalisms, the majority imposes a 2-1/2-year backpay remedy essentially because it would have phrased two items in a different way. By so doing, the majority has, in my view, adopted a wholly unrealistic approach to labor matters.

The majority decision here, in the words of the District of Columbia Circuit Court ''disdains even entertaining contrary implications where facts

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[5] Hansen was apparently a layman, not an attorney. His inartistic rendering of the Belknap cautions, described as ''vague'' by the majority, thus becomes comprehensible. I note that if Hansen's statements are read in conjunction with the other evidence in the case---in particular, Attorney Hubbert's 13 September presentation---they certainly are no longer ''vague.'' Even as they stand they clearly reflect an intent to hire on a permanent basis while, at the same time, cautioning that future events might have an effect on this intent. I think it clear that the replacements understood that they had the jobs for an indefinite period of time into the future. The Respondent's intent is the test. See Hot Shoppes, Inc., 146 NLRB 802, 804 (1964). The Board reversed the administrative law judge in that case, commenting that ''[t]he record contains no evidence that Respondent, in hiring the replacements, acted contrary to its usual practice in any respect.'' Here, the only difference from Respondent's ''usual practice'' resulted from the Belknap problem.

may cut both ways.'' Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 383 (D.C. Cir. 1983). It ''fails to assess and weigh the 'total factual context.''' Yellow Cab Co. of Minneapolis, supra, quoting NLRB v. United Insurance Co., 390 U.S. 254, 258 (1968). The majority opinion ignores general business and hiring practices, Hubbert's clear statements to the Union's representatives, the layman status of the Respondent's president Hansen, Belknap's issuance only a few weeks prior to the strike, all but one sentence of the Respondent's 29 August letter to the strikers, and the irrationality of the implied finding that the Respondent sought to hire only temporary replacements. By so doing, the majority opinion completely misreads the Respondent's actions and intent.

Contrary to the majority, therefore, I find that the Respondent's strike replacements were permanent and that the Union's offer on behalf of the strikers was not ''appropriate'' insofar as it concurrently demanded the discharge of those replacements. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. 30 April 1986

Donald L. Dotson, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reinstate economic strikers who offer to return to work before they have been permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer our striking employees who made offers to return to work immediate and full reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, with interest.

HANSEN BROTHERS ENTERPRISES

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Phillip Burton Federal Building and U.S. Courthouse, Room 13018, P.O. Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415--556--0335.

JD--(SF)--141--84
Grass Valley, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

HANSEN BROTHERS ENTERPRISES

and

Case 20--CA--18393

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 150, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA

Sally M. Spencer, for the
General Counsel.
N. Paul Shanley, Sacramento,
California, for Respondent.

DECISION

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Nevada City, California, on April 3, 1984. [1] The original charge was filed by Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, called the Union, September 26 (amended October 6), and the complaint was issued November 29. The primary issue is whether Hansen Brothers Enterprises, called Respondent, unlawfully during September and continuously thereafter failed and refused to reinstate numerous striking employees upon unconditional offer to return to their former positions of employment, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, maintains an office and place of business in Grass Valley, California, where it is engaged in compounding and

1 All dates are from July 1983 until April 1984 unless otherwise indicated.

transporting wet concrete. During a representative past 12-month period it purchased and received goods and materials valued in excess of $50,000 at this facility directly from points outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. Alleged Unfair Labor Practices

(a) Basis of Analysis

A collective bargaining relationship between Respondent and the Union has spanned approximately 25 years. The represented unit is one of truckdrivers and related occupations utilized in a construction business that includes road-building and pipe-laying. The most recent collective bargaining agreement, in which descriptive work classifications were set forth at Section 3 and a certain addendum, expired on July 1. Negotiations following that date failed to produce a new agreement, and on August 18 all Teamster-represented employees commenced an economic strike.

At that point in time Respondent had approximately 75 employees overall. Those represented by the Operating Engineers and Laborers unions largely honored the Teamster strike, in consequence of which most jobs in progress were shut down or affected as to anticipated completion dates. After Respondent made initial adjustment to effects of the strike, it sent a letter on August 29 to all Teamster strikers. This communication, signed by Arlie Hansen and Orson Hansen, respectively Respondent's president and secretary/treasurer as well as father and son, essentially solicited their return to work. It alluded to an intention to continue operations "to the best of our ability," adding that replacements being recruited "may" result in loss of re-employment rights by those on strike.

Frank Lomascola, the Union's Sacramento-based business agent, was advised of this letter on September 6 while at the site of picketing. The following afternoon he spoke with Aubrey Hubbert, Respondent's labor relations attorney, in the latter's Sacramento office. Lomascola testified that he first referred to the letter, which Hubbert said he had helped prepare. Lomascola recalled discussion of possible strike resolution, and a tentative offer on his part to have drivers return to work under the old contract. This seemed amenable to Hubbert and the discussion ended with Lomascola saying he would have to conduct a vote on the matter with his members. Lomascola then arranged a meeting and traveled the 50 mile distance to Grass Valley, where he met with the 18 assembled strikers across from Respondent's facility. He presented the notion of a return to work, and found it unanimously and unconditionally acceptable to the group. Accompanied by shop stewards Ed Tellam and Thomas Browning, Lomascola then walked across the street and spoke with Arlie Hansen who was occupied in yard work at that point of early evening. Hansen was told the Teamster members had just voted to go back to work. Hansen replied that his lawyer should be contacted.

Lomascola commenced a return to Sacramento and at about 7:45 p.m. telephoned ahead to Hubbert at the latter's home. Hubbert had no advice of consequence then and invited a later call. In the intervening time he learned from a Hansen that two strikers could be utilized for work the next day, specifically employees Tom Osborne and Browning. This information was conveyed to Lomascola when he telephoned a second time at around 9:15 p.m. Lomascola testified that he said this proposal created a problem because the two named were not top seniority and it could cause later grievances. [2] Hubbert's version is how he projected during the second telephone conversation that other strikers would likely be re-employed shortly, but Lomascola's response was that employees could not accept the employer choosing only two based on its own evaluation of useful skills. Hubbert added that he necessarily took Lomascola's words to be that employees would not return to work on that condition.

Matters were then briefly dormant, except for continuing operations by Respondent with a complement of at least seven replacement employees. A negotiating session was held on September 13 at the employer's facility. Present for the Union were business representative Lee Ishmael, spokesman until Lomascola's anticipated late arrival, Tellam and Browning, while Respondent was represented by Hubbert, the Hansens, and son-in-law Bill Goss. After preliminary discussion of status relative to a new contract, Ishmael made a pleading inquiry about the prospects for returning Teamster strikers to work. Lomascola testified that after arriving and caucusing to acquaint himself with earlier happenings of the meeting, he proposed a return to work by the drivers. Hubbert denied that either Ishmael or Lomascola ever made a specific statement about strikers returning to work other than as part of an overall contract settlement. Those present agree that Hubbert raised a case "back East" dealing with employer liability to strike replacement employees terminated after having been given assurances of permanence. [3] From these conversational exchanges a debate ensued about Respondent's replacements. Lomascola testified that he consistently termed it strictly a problem of the employer, while Hubbert asserted that Lomascola demanded discharge of all the replacements as part of any settlement and return of Teamster members.

The next bargaining session occurred September 30 at Hubbert's office with a federal mediator to facilitate. Lomascola testified that he again asked about the possibility of returning the drivers to work. Hubbert recessed for a call to the Hansens, and returned to say that Respondent was not prepared to bring any striker back to work. Hubbert testified that he then reiterated Respondent's earlier offers to take strikers back by seniority as openings occurred, and that Lomascola and his committee rejected this course.

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2 The expired contract had seniority language dealing with reductions in force and specific use of "longest length of continuous service ... when ability is approximately equal."

3 This was Belknap, Inc. v. Hale, ____U.S.____ (1983), 113 LRRM 3057, a 6 - 3 decision to such effect.

(b) Analysis

The initial principle applicable to this case is that any economic striker is entitled to reinstatement upon unconditional return to work offer, provided their positions have not at such time been filled by a permanent replacement. [4] In terms of General Counsel's pleading this raises the factual issue of whether on September 7, 13 or 30, such an unconditional offer was made on behalf of the 18 striking employees of the Teamster bargaining unit.

A direct resolution of credibility is first necessary. I disbelieve Lomascola and the corroborative testimony offered by Tellam, Browning and Ishmael. On demeanor and probability grounds I am not persuaded that Lomascola or those allied with him have a reliable recollection of salient facts. The first variance arises during Lomascola's second telephone call to Hubbert on the evening of September 7. As to this I accept Hubbert's more credible testimony that Lomascola rejected the notion of having only two striking drivers return the next day because that would not be an acceptable component of what the whole group wished to achieve.

In the next episode of September 13 I similarly discredit Lomascola and his corroborators in a claimed repetition of the unconditional return to work offer, finding instead that Hubbert, credibly supported by both Hansens, correctly described the Union's contention as one of conditioning any mass availability for return to work on the release of all replacements hired up to that point.

The final exchange on September 30 totally fails to support General Counsel's contentions, for here even Lomascola only asserts that he made desultory inquiry about his members resuming employment. I am convinced overall that Lomascola has not truly presented his own or answering remarks, and that he has done so in an attempt to deviously create legal rights where none exist. His testimony was fundamentally hesitant, confused, evasive, vacillating and abundantly suspect. Aside from numerous palpable instances in which these characterizations are found, he deviated from what is contained in his investigatory affidavit and made a curiously odd denial of even recognizing the term "maintenance of membership". [5] I discredit Tellam, Browning and Ishmael on demeanor bases, under which they did not present a convincing recall but were instead inclined to merely parrot Lomascola's assertions.

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4 NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

5 This final point is noted only as a minor illustration of Lomascola's proclivity for random equivocation. It does not square well with his extensive labor relations experience, and the concept was readily presumed to be commonly "known" when discussed in a Board case involving another Teamster affiliate Roberts Electric Co., 227 NLRB 1312, 1320 (1977). The term "maintainence of membership" has also been aptly and authoritatively explained as one basic type of negotiated union security. Grodin and Beeson, State Right-to-Work Laws and Federal Labor Policy, 52 Cal. Law Rev. 95-114 (March 1964).

I have carefully reflected on General Counsel's argument that Lomascola has been direct and specific, while Hubbert displayed an inexplicably poor memory for detail. My resultant belief from this is that Lomascola's specifics are not reliable, and that Hubbert's indirection reflects only a cautious mode of presenting testimony. Respondent has advanced five separate grounds upon which to contend that conditions have always attached to the offers, and the composite of credible testimony is sufficient to support each defense.

In the absence of any striker having been identified with an unconditional return to work offer, key allegations of the complaint are without legal support. What is shown instead is the Union attempting a sudden rehabilitation from poor tactical position, and failing to change the legal relationship from a standard economic strike situation coupled with continuous bargaining. I specifically find that the abrupt advice to Arlie Hansen on September 7 was not, as General Counsel argues, an effective offer of unconditional return to work, for Hansen was not only entitled under the circumstances to pass these dynamics on to his retained attorney but Lomascola himself had recognized Hubbert's key role by earlier that day seeking him out for the actual origination of remarks on the subject.

It is however true that Respondent in turn has utterly failed to establish any permanent characteristics to the employment of replacement drivers. This is evident from Arlie Hansen's own testimony in which he could do no more than express a "hope" that such individuals would view themselves and be viewed as permanent. The fact was that Belknap had alarmed Respondent's counsel to the point that dealings with these replacements deliberately skirted any commitment of permanence. For this reason the Mackay rights of the strikers appear undiminished to date, a condition that harmonizes well with Respondent's several representations of record that preferential rehiring is still available on a seniority basis to the Teamster members. Cf. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); The Laidlaw Corporation, 171 NLRB 1366, (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. den. 397 U.S. 920 (1970); Associated Grocers, 253 NLRB 31 (1980).

Accordingly I render a conclusion of law that Respondent has not violated the Act as alleged, and issue the following recommended:[6]

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6 In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.

Dated: August 2, 1984

DAVID G. HEILBRUN
Administrative Law Judge

The relevant portion of Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(c) provides:

(c)... In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

APPENDIX F

Section 102.46(b) of the Board's Rules and Regulations, Series 8, as amended, provides:

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

APPENDIX G

Section 102.46(c) of the Board's Rules and Regulations, Series 8, as amended, provides:

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

APPENDIX H

Section 102.48(a) of the Board's Rules and Regulations, Series 8, as amended, provides:

> Action of Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions -- (a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to section (10)(c) of the act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

APPENDIX I

Certificate of Service

I am a citizen of the United States and a resident of the State of California, County of Sacramento. I am over the age of eighteen years and not a party to the within action. My business address is 2535 Capitol Oaks Drive, Suite 210, Sacramento, California 95833.

On June 25, 1987, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing three (3) true and exact copies thereof, enclosed in a sealed envelope with the postage thereon fully prepaid in the United States mail at Sacramento, Sacramento County, California, addressed as follows:

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Solicitor General
Department of Justice
Washington, DC 20530

I, ROBERT L. REDIGER, certify that the above is true and correct. Executed this 25th day of June, 1987, at Sacramento, Sacramento County, California.

ROBERT L. REDIGER